

Misguided 'Associate EU Citizenship' Talk as a Denial of EU Values

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Guy Verhofstadt is famous for articulate 'The answer is more Europe' positions on all issues European. Jan-Werner Müller might be right: should there have been no Verhofstadt, Eurosceptics would have had to invent him. This is particularly so given his position on EU citizenship for UK nationals after Brexit as the chief European Parliament Brexit negotiator. In this contribution, based on my testimony on EU Citizenship law in front of the Rights and Liberties committee of the European Parliament on 19 February 2018 I explain why playing with any kind of 'associate EU citizenship status' for the Brits after Brexit is a terrible idea undermining all what should be cherished about the project of European unity. I thus welcome the approach to the rights of UK citizens in the EU and EU citizens in the UK proposed by the European Commission in the Draft Withdrawal Agreement published on 28 February 2018. Verhofstadt's proposals have not so far hindered a reasonable approach taken by Michel Barnier. The points below would be considered too obvious to any lawyer familiar with EU law, but since we hear more and more benevolent euro-totalitarianism from the floor of the European Parliament – an institution we expect to oppose it rather than to promote it – it is worth repeating these basic points again in the hope that 'associate citizenship' will not undermine EU's credibility and the future of European integration.

EU Citizenship's value

The importance of European citizenship for all the nationals of the Member States is obvious: the 'fundamental status' enlarges the horizon of our opportunities from one state to (still) twenty-eight. It is one of the building blocks of a better tomorrow in Europe through both the extension of important rights and the taming of the nationalisms and proclaimed particularisms across the continent. EU citizens are shielded from the absurd requirements to learn all European languages, dances and cooking traditions: we are welcome in every Member State of the Union without any exceptionalism-inspired cultural vetting of the kind applicable to third country nationals.

EU law, as 'the legal heritage of individuals', to quote the Court of Justice in *Van Gen den Loos*, thus has one overwhelming added value as far as citizenship is concerned. In the scope of EU law it makes outright illegal what any nationalist, patriot and an occasional bystander takes for granted as a core value: discrimination on the basis of nationality. This is, indeed, the core added value of any nationality in fact: glorification of the irrational at the expense of others, Renan's '*l'oubli et l'erreur historique*'.

In other words, the core input of European citizenship, unquestionably putting this status in sharp conflict with the nationalities of the Member States from which it is derived, consists in the constant humiliation of the absurd nationalist claims presuming that the holders of a particular passport and speakers of a particular language are better than anyone else in the

world. EU law prohibits France from loving the Frenchmen more than any other Europeans, it makes it impossible to pay EU citizens less or to give a preference to any particular nationality. EU law is a bulwark designed to obstruct the harmful irrational, which states otherwise cherish and, even more, instill in the hearts of their citizens.

This core aspect of EU citizenship is usually in the shadow of free-movement, but undeservedly: the non-discrimination aspect is significantly deeper conceptually than merely breaking open the territories of the Member States for each other's nationals. One does not need to boast any experience of a third country national in the EU, which is a polity famously characterized by Étienne Balibar as *apartheid européen*, to notice the difference in the legal world EU citizens and foreigners live in. Foreigners are confined to their respective Member States of legal residence, the whole context of European integration does not in fact exist for them, all the invisible borders forming the bars of the cage ceiling of their opportunities. As I have explained elsewhere with Martijn van den Brink, in the case of non-citizens the EU de facto pretends that it is simply not there.

Any minimally informed third country national would thus have no difficulty in seeing the added value of EU citizenship: it simply takes a nationality of a Member State and multiplies all the rights attached to it by twenty-eight: a game-changer in terms of rights. Brexit, on this count, unless it amounts to an EEA-style or Swiss-style membership is bound to be a disaster at the level of the ordinary British lives as lived. A respectable Burgundy passport will turn into blue trash, Kazakhstan style, as research shows, losing a huge share of its value in terms of the rights and opportunities the UK nationality will be able to endow its holders with. There is no possible dispute on this: yes, Brexit, if it actually 'means Brexit' signifies one thing: severe humiliation of all the population of the UK and the destruction of rights on hitherto unprecedented scale.

The absurdity of Brexit: what to do about it?

The question now is what to do about this, once we have diagnosed this destruction. Approaches will differ, depending on which side of the Channel one is. From the point of view of citizenship Brexit is shorthand for one and only thing: xenophobia. Xenophobia remains xenophobia no matter how it is dressed up and presented: the nationalist dream – just as the EU's own, with its apartheid and no free movement and key rights for EU citizens, pace Diego Acosta and other idealists – means that unlike in the EU, UK nationality suddenly becomes truly meaningful. Parochial, no doubt, losing the factor 28 multiplication in terms of the rights all individuals enjoy – but meaningful in the most basic primordial sense: all those who do not have it will by law have it worse still, than the holders of the 'right' Kazakhstan colour passport, the apotheosis of the birthright lottery, to borrow from Shachar, a triumph of random assignment of rights over justice and non-discrimination. Indeed, the only added value of xenophobia in the concrete terms of Brexit and citizenship is only one: discrimination on the basis of nationality will become legal in the UK. This is nothing else but an undoing of the core European ideal. This undoing of the ideal is, per se, not anti-European, since, once again, this is exactly how EU citizenship itself works vis-à-vis any nationality of any third country.

To make xenophobia work pragmatically – and we are now looking at Brexit from little England – deviations from it are possible in some cases. For instance, the UK will probably be able to give full access to its labour market to the holders of the nationalities it dislikes less – the Danes for instance, or the Irish – as opposed to those it is more xenophobic about, say Romanians or Poles – just as the EU itself does it with the Swiss, New Zealand with Australians and Albania with Americans. This is what ‘taking back control’ means. You know you can discriminate on the basis of nationality and you do it, however irrational this is. You do precisely what the EU has been created to prohibit among the participating states. Why would anyone leave the EU otherwise?

Now, looking from Brussels and Rome, the picture changes somewhat: the question is what should we do about Brexit and the seemingly unavoidable failure of the UK nationality in terms of the shrinking rights and the reign of discrimination on the basis of nationality knowing that the UK is not violating any rules, it is simply creating its own, fully in line with those practiced by the EU on a daily basis? To Guy Verhofstadt the answer is clear: more Europe. Let us extend EU associate citizenship – whatever this can be, but presumably coming with EU rights for the holders – to those Britons who wish to have it. This answer, while it is premised on an absolutely correct diagnosis of the situation, and even boasts its own citizens’ initiative, is overwhelmingly harmful to any pro-EU European. In fact, this totalitarian and self-righteous talk undermines all the values the EU has been created to uphold. The Court of Justice is now capable of moving in the direction of this disaster too – following a most dubious reference in a moot case submitted in abuse of Article 267 TFEU. Anything is possible here, as Davies has shown, even if Guy Verhofstadt fails. There are at least four key problems with associate citizenship idea as a way to mitigate the Brexit disaster.

The first problem

Firstly, whether Verhofstadt likes it or not, in Europe – and the UK is included – democracy remains valuable. This is our core distinguishing feature from the majority of other continents and blocs around the world. Even more, the Union is under a legal obligation to remain more or less a democracy it is under Article 2 TEU and not to undermine the democracies of the Member States – and their constitutional traditions as per Article 4(2) TEU.

The fact that the provision is now frequently abused by oxymoronic ‘illiberal democracy’ ideals in Hungary, Poland and elsewhere does not so much devalue the text of the provision as makes it more acute: ‘The Union shall respect the equality of Member States before the Treaties as well as their national identities, inherent in their fundamental structures, political and constitutional’. Respecting British democracy and the functioning of UK institutions is one of the core obligations lying on the EU.

To make sure there is no overreach in other cases in the future, Brexit should not become a pretext for a power-grab. Respecting national constitutional traditions and democracies means precisely that: allowing the UK and its nationals to decide. As is often the case in any democracy, any decision is bound to generate winners and losers, and the core

difference between a functioning democracy and its illiberal – read impossible – variant Poland/Hungary style is that democratic deliberation is not pre-empted by righteous know-it-all talk.

A popular myth that preservation of rights is the core concern of a democracy rather than creating a climate of solid legitimacy and national deliberation is of course questionable. One of the MEPs, Madame Spinelli of Italy repeated the ‘no losers’ mantra at the Committee hearing, but given that virtually no right is absolute and that democracies are the only civilized way to juggle rights, ‘no losers’ stands for the pre-emption of ongoing democratic engagement. Of course the MEPs know better than the misinformed millions of Brits. Yet, even if this were true, substituting the judgement of Madame Spinelli for the majority of the Brits would probably be incorrect. Even more so if such substitution signifies a move on the side of the EU to ignore its obligations under the values clauses of the Treaties. Even worse, the righteous rhetoric of ‘no losers’ hides the fact that all those whose voice is not heard should the UK be bound by ‘associate citizenship’ will be precisely that – losers – with a unique difference that they will be in the majority.

The trouble with righteousness, which usually presents the opponent as either not sufficiently educated to understand or as an outright silly person in need of compassion, instead of political rights, is that it ignores a basic wisdom Sir Isaiah Berlin has once been surprised by so much: reasonable people who are perfectly sane and well-meaning can legitimately disagree on plenty of things. This is the crooked timber of humanity. Branding Brexiteers as ill-informed idiots and believing, as Madame Spinelli or Guy Verhofstadt do, that the UK does not deserve to have a say about its own future does not create a democracy without losers. It simply switches democracy off – illegally – and rebrands the new losers as those who are not well educated enough to understand. There is no doubt about the fact that Spinelli and Verhofstadt could be right: Brexit is bound to be a disaster, but the illegal totalitarian solution they endorse is too dangerous in dismissing EU’s own values to have any traction.

The second problem

Secondly – and this point is related to the one above – given that EU citizenship is, alongside with the internal market, one of the two core pillars of EU law it is impossible to pretend that Article 50 TEU and the very idea of leaving the EU actually make any sense whatsoever if EU citizenship is something that cannot be disposed of by the nationals of a Member State in a context of leaving the EU. In essence, Verhofstadt is trying, in fact, to render the very possibility of leaving the EU – unquestionably present in the EU Treaties – null and void based on what he believes in. As a European who grew up in the Soviet Union – in a cage – I would not rejoice in this self-righteous perspective. Choice, even if it is a wrong one from someone else’s perspective, is valuable. Freedom implies an ability not to agree with Verhofstadt, Spinelli, or me. It is thus absolutely unacceptable to fail to see that the effectiveness of Article 50 TEU is rendered mute by a potential lack of ability to get rid of EU citizenship.

The eurocrats' thinking is very understandable. After all, it is the essence of EU law that it knows better than you or any of the EU's democracies. This is EU's strength, but also its key weakness, its Achilles heel. It pre-empts national democratic decisions in the ever-growing scope of own competences while the supranational democracy in any responsibly realistic sense of the word does not exist.

In always knowing better than anyone disagreeing with it while not guided by its citizenry the EU is of course a dangerous creature. This danger is not only theoretical but also practical: Gráinne de Búrca is right in calling it a powerful actor of injustice. Since the EU knows better, it can also render the citizens it dislikes invisible by the apportionment of equality before the law which is only made available, in the EU, to the 'good citizen', who is economically productive, mobile, and successful. All the others, the invisible, the vulnerable and the sick, besides being ignored, cannot vote the scoundrels out: this is something the EU knows too little about. There is thus nothing to be done by those who feel that the protections of EU law are frequently based on the requirement to commit ethically contingent and often outright irrational acts, such as crossing internal borders within the Union where the right to a home, or to a family does not exist.

The third problem

Moving to the third point it is clear that when the chief negotiator representing one of the key institutions, the only one, probably, with a claim to be 'democratic', proclaims that the very object of negotiation – i.e. leaving the EU – is not in fact on the table, since membership should linger on through 'associate citizenship', this does not point in the direction of negotiating in good faith.

It is thus good news, however terrible the loss of rights by the Brits is bound to be, that Guy Verhofstadt is not actually at the negotiating table. A legal red line denying the very availability of the subject-matter of negotiations means that there is not much to talk about. Add to this the most likely legal impossibility of the 'associate citizenship' under the current version of the Treaties, and the unhelpful nature of bringing it up becomes even clearer. The Draft Withdrawal Agreement published by the European Commission on 28 February 2018 is thus to be only welcomed: there is no sign of what Verhofstadt has been advocating in this thoughtful document. Particularly Article 32 is significant:

“In respect of United Kingdom nationals and their family members, the rights provided for by this Part shall not include further free movement to the territory of another Member State, the right of establishment in the territory of another Member State, or the right to provide services on the territory of another Member State or to persons established in other Member States”.

Full reciprocity applies: UK nationals who used to be EU citizens and reside in one of the EU Member States can continue to do so, while EU citizens in the UK also see their legal position secured. Offering UK nationals further free movement rights is not an option, since the UK having chosen to do it alone, cannot reciprocate in any way possible.

This is not surprising: should the associate EU citizenship line be followed, the EU would undermine its own claims to be a democracy based on the Rule of Law, as well as the *effet utile* of one of its core constitutional provisions because of its condemnation of a wrong

political outcome of the democratic process in one of the Member States, something we have already seen in Austria a while ago when the country was ostracized in violation of EU law in reaction to electing Jörg Haider's FPÖ – a development that is at the base of the failure to deal with the destruction of the institutions in Poland and Hungary today.

The fourth problem

Lastly, and most importantly, Guy Verhofstadt's associate citizenship means that the EU citizenship of those who have voted out in the exercise of their political self-determination and now come to regret this outcome but not sufficiently in order to mobilize significantly and reverse it at the national level are more valuable to the EU as citizens than all those who actually live in the EU and experience the Balibar *apartheid européen* every day, like millions of those for whom the core EU rights do not exist since they do not have a nationality of any of the Member States in a situation where a direct citizenship connection with the EU is still impossible.

This is the sad side of EU politics today: the Union is often unable to see its own flaws – let alone correct them – while eagerly offering help to those disappointed by the legitimate outcomes generated by their national democracy, even if this help is in direct contradiction with the EU's long term interests: building a robust European democracy based on the rule of law and the protection of human rights, which would ensure equal protection before the law and respect fundamental rights and protections guaranteed in its own law.

The most significant among these is the right to leave for whatever reason, no matter what the EU thinks about whether this is right. Besides betraying Europeans without EU rights – like the stateless Latvians, Estonians and Slovenes for instance, other European minorities who are not granted EU citizenship – either associate or not, since the EU is actually prone to throw its weight behind local nationalisms, rather than protecting minority groups from discrimination, regrettably, Guy Verhofstadt's proposals humiliate also all the Europeans in the UK.

Once out, the UK is not anymore territory of the EU – no EU citizenship, associate or full, will be of any value in that country then. This means that speaking of associate citizenship and offering EU rights to British citizens before the UK has unconditionally and unequivocally signaled that it would reciprocate – and it has all the rights not to – is not a successful example of attempting to solve key outstanding problems. The EU does not care about the stateless Europeans, it has nothing to say about minorities, vulnerable EU citizens are invisible to it, the protection of its law is made contingent on the history of travel and the thickness of someone's wallet, and now it tells us – through the associate citizenship idea – that former EU citizens of UK nationality who have exercised their right to leave are more vulnerable in its eyes and need more protection than all the groups mentioned above amounting to the absolute majority of the EU's population.

Article 50 is a bizarre creature. A Schmittean interpretation of it would point in one direction: the provision itself is an attempted power-grab, pretending that the EU is the one to take the decision on the exception. Its own law is the law of exit. Well, power-grabs do not always work well, and the associate citizenship as proposed is an opportunity for the EU to lose its face by denying all what it is preaching and obliged to protect while

overstepping important red lines, which are there for a reason. After all, Verhofstadt knows better, precisely because – although he is a Member of Parliament – the EU is not a democracy and the UK is.

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